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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RAJON AKEEMLEE ALEXANDER, Defendant and Appellant.	F073467 (Super. Ct. No. 1490666) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Stanislaus County. Nancy Ashley, Judge.

Dale Dombkowski, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and R. Todd Marshall, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Poochigian, Acting P.J., Detjen, J. and Snauffer, J.

After a trial in which he represented himself, defendant Rajon Akeemlee Alexander was convicted of attempted murder and several related counts based on a 2015 shooting. He was sentenced to 41 years eight months in prison.

In pretrial, when Alexander was represented by counsel and his jury trial set, Alexander requested to represent himself stating he did not want his counsel to do so. His request was granted.

In pre-trial motions, Alexander made it clear to the trial court he wanted his trial to proceed without delay. The court asked Alexander whether he would have any witnesses. In response, Alexander informed the court that staff at the jail where he was being held were not allowing him to use the telephone unless he paid for it. He stated that he needed to use the telephone to prepare his defense and had no funds with which to pay. He asked the court to issue an order directing the jail to provide him free telephone access for the purpose of preparing his defense. The trial court denied the request on the grounds that it could not issue such an order, the matter was within the sole discretion of the sheriff's department, and Alexander would have to work it out with jail personnel himself. The court noted Alexander's request on its minute order.

Alexander's defense was an alibi—he claimed he was out of town, with the mother of his child, at the time of the shooting. He had no alibi witnesses to call at trial, however.

We hold, under the facts of this case, telephone access to contact potential defense witnesses was a request for reasonably necessary defense services. There was no reason to deny the request, the basis of which was sufficiently clear in the pretrial proceedings. Under the California Supreme Court's cases on the subject, the trial court's ruling violated Alexander's right to counsel under the Sixth Amendment and the California Constitution. Alexander was prejudiced by the error. Accordingly, the judgment is reversed.

FACTS AND PROCEDURAL HISTORY

The district attorney filed an information charging Alexander as follows:

Count	Offense	Enhancement
1	Attempted murder of Raymond Jones (Pen. Code, §§ 187, subd. (a), 664)[1]	Personal use of a firearm (§ 12022.53, subd. (b))
2	Assault on Raymond Jones with a firearm (face/head) (§ 245, subd. (a)(2))	
3	Assault on Raymond Jones with a firearm (leg) (§ 245, subd. (a)(2))	Personal infliction of great bodily injury (§ 12022.7, subd. (a))
4	Possessing a concealed dirk or dagger (§ 21310)	
5	Being a felon in possession of a firearm (§ 29800, subd. (a)(1))	
6	Possession of methamphetamine, a controlled substance (misdemeanor) (§ 1377, subd. (a))	
7	Resisting arrest (misdemeanor) (§ 148, subd. (a)(1))	

The information also alleged that Alexander had a prior serious felony within the meaning of section 667, subdivisions (a) and (d), an attempted burglary conviction (§§ 459, 664) from 2015.

On October 14, 2015, the court denied Alexander's motion to replace his appointed counsel. It also suspended the proceedings pursuant to section 1368 and referred Alexander for a mental competency evaluation. On November 12, 2015, the court found Alexander competent and reinstated the proceedings. On November 16, 2015, the court granted Alexander's second motion to replace his appointed counsel and his motion to represent himself.

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1 Subsequent statutory references are to the Penal Code unless otherwise noted.

At a hearing on pre-trial motions on January 4, 2016, Alexander made it clear to the trial court he wanted his trial to proceed without delay. The court asked Alexander whether he would have any witnesses. In response, Alexander explained to the court that he had chosen to represent himself because his appointed counsel was unwilling to pursue the strategy Alexander preferred. Alexander was willing to concede he was guilty of possessing methamphetamine and a dirk or dagger when he was arrested, but he wished to establish his innocence of the charges based on the events of the day of the shooting. His appointed counsel had hoped only to obtain convictions of lesser charges based on those events. Alexander's defense to the charges based on the day of the shooting would be that he "didn't do it."

The court asked Alexander whether he would be presenting the testimony of any witnesses. He responded by saying he had had no opportunity to contact anyone by telephone and asked for a court order. The court said it could do nothing about that:

"THE COURT:	All right. Are you planning on calling any witnesses?
"THE DEFENDANT:	Um, I have no phone time. I was about to ask you if you can court order free phone call[s], so I can make the phone calls to see if, like, I'm able to, like, have something in my case. Because I don't have no phone time or anything. Nobody—I know I'm pro per, and supposed to get the necessities I needed.
"THE COURT:	Yeah, kind of up to the Jail to do that. I don't—
"THE DEFENDANT:	Like, just supposed to be court ordered, and ask the judge, and you can court order for me.
"THE COURT:	Still up to the Sheriff's Office, and I don't know what your status is, or anything else. So that's up to—
"THE DEFENDANT:	As of now, nobody provided me with the right necessities that I've been needed.

"THE COURT: Okay. But you are ready to go to trial, then today?

"THE DEFENDANT: Yeah.

"THE COURT: Whether you have witnesses or phone calls or?

"THE DEFENDANT: Yeah.

"THE COURT: No matter? Ready to go Wednesday?

"THE DEFENDANT: Yeah."

The court proceeded to rule on the People's motions in limine. Afterward, at the end of the hearing, the court returned to the topic, repeating that it had no power to order telephone access but saying it would note Alexander's request on the minute order:

"THE COURT: I'll have the clerk put on the minute order that you are requesting that you be allowed to make phone calls. That's the best I can do and see."

Alexander sought clarification on whether this would result in his receiving the services he needed; the court again asserted that the matter was out of its hands and would have to be settled between Alexander and the jail staff. Alexander acknowledged the adverse ruling.

"THE DEFENDANT: I'll be able to get those phone calls, right?

"THE COURT: It's up to the Jail and jail staff. I just asked the clerk to write on there that you are requesting to use the phone. It's up to you.

"THE DEFENDANT: I have access to the phone, it's just –the free pin codes that we're given, like, I don't have no money to make the calls out. I don't have no money on my phone time to make the calls. It's up in our cell.

"THE COURT: I don't know how that works exactly with the Sheriff's Office. That's their deal. I do mine over here and they do theirs over there. I don't know how they handle that, but that's why I just

asked the clerk to write on the minute order, so they know that it's an issue.

"THE DEFENDANT: Free pin calls, that way they know?

"THE COURT: That's up to the Sheriff's Office, though. So I can't order that anything—

"THE DEFENDANT: All right.

"THE COURT: Put on there he's requesting access to the phone, and free calls, or something like that, just so they know what the issue is. But that's completely up to you.

"THE DEFENDANT: Yes, ma'am."

The court issued two minute orders after this hearing. One stated: "The defendant requests to be allowed to make phone calls from the jail." The other said: "Deft. requests to be permitted to use phone & free calls." Neither order mentioned that the purpose of the request was to allow Alexander to prepare his defense as a self-represented defendant.

Pre-trial motions continued the following day. Alexander agreed to stipulate that he was in possession of methamphetamine and a dirk or dagger the day he was arrested.

Alexander acknowledged that he did not want the jury to be instructed on lesser included offenses for counts 1, 2, or 3. Observing that such instructions would not "be in keeping with this defense anyways," the court indicated its understanding that Alexander's defense would be that the shooter was not him.[2]

The court returned to the question of whether Alexander planned to present witness testimony.

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[2] As it turned out, the court did instruct on attempted voluntary manslaughter as a lesser included offense of count 1 and simple assault as a lesser included offense of counts 2 and 3.

"THE COURT: And then, Mr. Alexander, yesterday you weren't sure whether you were going to have any witnesses or not. Do you anticipate calling witnesses or no?

"THE DEFENDANT: No. I never—no. No."

When the proceedings continued the next day, a private attorney named Alonzo Gradford was present. There is no explanation in the record for Gradford's appearance, except for the court's remark that "Mr. Gradford, as an officer of the Court, in an effort to be helpful, has spoken to Mr. Alexander this morning." Alexander and the prosecutor (who had "some witness issues") both agreed to trail the trial for one day. The court advised Gradford that the proceedings would resume the next day, and "[i]f it gets to that, I could appoint you." Gradford agreed. He took copies of some of the documentary evidence with him. Alexander appeared the following day without Gradford and affirmed that he would be continuing to represent himself; Gradford thus was never appointed as advisory counsel or otherwise. A minute order was issued stating that Alexander had elected to continue representing himself after Gradford "advised him about the consequences of representing himself."

Just before jury selection began that day, the court gave Alexander an opportunity to raise any additional issues:

"THE COURT: Still no names for the witness list, correct, Mr. Alexander?

"THE DEFENDANT: Excuse me?

"THE COURT: Still no additions to the witness list?

"THE DEFENDANT: No, ma'am.

"THE COURT: Okay. Mr. Alexander, anything that you wanted to put on the record, or anything? Any issues you have before we get started this afternoon at 1:30?

"THE DEFENDANT: No, ma'am."

The evidence was presented to the jury the following day. The prosecution presented three eyewitnesses, one of them the victim, all having prior acquaintance with Alexander, who gave testimony in support of the following account of the events of August 5, 2015: Alexander came to Raymond Jones's house and started an argument. Alexander accused Jones of being with Alexander's girlfriend, Diamond, and said he would have to pay him for it. Jones said he was just friends with her. Alexander pulled out a handgun, pointed it at Jones's face, and pulled the trigger. It did not fire. Alexander checked the gun. As he did so it went off, and Jones was shot in the leg. Alexander walked away slowly, holding the gun, while Jones and his niece followed at a distance. Police and an ambulance arrived, but by then Alexander was gone.

The next day, police apprehended Alexander after a foot chase. Alexander threw a knife away as he ran and had a bindle of methamphetamine and a bindle of marijuana in his pocket when he was caught.

The only evidence Alexander produced in his defense was his own testimony. On direct, his entire testimony was as follows:

> "Um, hello today. As you know, my name is Rajon[] Alexander. I'm representing myself, because I feel it's in my best interests. Just here to tell you, like, I'm innocent. I didn't do it. I wasn't there. Like, just I admit that I had—I had the knife and all that. I admit that I ran and I had methamphetamine, but this other stuff[,] I didn't do it. I—I was in Sacramento. I was visiting my daughter that I just had, you know what I mean. I guess it was the date it allegedly happened, so it's just—I just feel like—I don't know. This is hard. I didn't do. I'm innocent. I didn't do it."

On cross-examination, Alexander specified that he was in the Del Paso Heights neighborhood of Sacramento and was with Navea, the mother of his child. Diamond was not his girlfriend. He knew someone named Raymond with whom a girlfriend of his might have been cheating, but it was not Raymond Jones. He had seen Raymond Jones,

but did not know him, and had never been to his house. He did not know the other witnesses who testified against him.

The jury found Alexander guilty as charged, except that it found him not guilty on count 2, having been instructed that this was charged as an alternative to count 1. In a bifurcated proceeding, the court found true the prior felony allegation.

The court imposed a sentence of 41 years eight months, calculated as follows: On count 1, the middle term of seven years doubled for a prior strike, plus five years under section 667, subdivision (a), and 10 years for the firearm enhancement; on count 3, one year, comprising one-third of the middle term, doubled for the prior strike, plus five years under section 667, subdivision (a), plus three years for the great bodily injury enhancement; on counts 4 and 5, eight months each, comprising one-third of the middle term, doubled for the prior strike; on counts 6 and 7, time served.

DISCUSSION

The California Supreme Court has held that the Sixth Amendment to the United States Constitution and article 1, section 15 of the California Constitution guarantee access to ""“reasonably necessary defense services”"" as part of the right to counsel for all criminal defendants, including self-represented defendants. (*People v. Moore* (2011) 51 Cal.4th 1104, 1124; *People v. Blair* (2005) 36 Cal.4th 686, 732-733 (*Blair*), overruled on other grounds by *People v. Black* (2014) 58 Cal.4th 912, 919-920; *People v. Jenkins* (2000) 22 Cal.4th 900, 1040.) “It is certainly true that a defendant who is representing himself or herself may not be placed in the position of presenting a defense without access to a telephone, law library, runner, investigator, advisory counsel, or any other means of developing a defense.” (*Jenkins, supra*, 22 Cal.4th at p. 1040.) This does not mean every self-represented defendant is entitled to every one of these services. It has been held, for example, that “[w]hen the defendant has a lawyer acting as advisory counsel, his or her rights are adequately protected” even if some other services, such as access to a law library have not been provided. (*Ibid.*) Further, “[i]nstitutional and

security concerns of pretrial detention facilities" can be factored in by a court when determining which services a self-represented defendant should receive for aid in preparing his or her defense. (*Ibid.*) The fundamental principle is "only that a self-represented defendant's access to the resources necessary to present a defense [must] be reasonable under all the circumstances." (*Blair, supra*, 36 Cal.4th at p. 733.)

Alexander told the court he needed access to the telephone. The context of the colloquy indicated he needed telephone access in order to contact potential witnesses to testify in his defense. He told the court he had no funds to pay for the calls; and presumably the court had already found him indigent, since it had earlier appointed counsel to represent him. Contacting potential witnesses was the only form of preparation Alexander expressed a wish to engage in, and he asked for the least expensive means of doing it: calling them on the phone himself. He did not ask for advisory counsel, an investigator, or a runner to help him with the task.

The trial court had the authority and obligation to provide access to reasonably necessary ancillary defense services. The court could have made small sums of money available for Alexander's use for incidental expenses like the cost of telephone calls from the jail. (See, e.g., *Blair, supra*, 36 Cal.4th at p. 734 [trial court provided defendant a budget of $40 for incidental expenses such as telephone calls and stamps].) Instead, the court informed Alexander that he had to rely upon the sheriff's department so far as telephone use was concerned. The minute orders stated that Alexander wanted free telephone access, but there was no order for access. The court erred.

The next question is whether the error was prejudicial or harmless. We conclude the record demonstrates the defendant was prejudiced. Alexander was denied the opportunity to prepare his only defense because he had no way of contacting potential alibi witnesses he asserted might be found. He requested use of the telephone. The court did not express any considerations against it (e.g., security concerns, past problematic behavioral problems with Alexander, etc.).

We cannot say that if Alexander had been given access to a telephone, he would not have been able to secure the testimony of his child's mother or another witness who would testify that he was in Sacramento at the time of the shooting, or that the testimony would not have appeared credible to the jury. We clearly do not suggest we find this *likely*. On the contrary, three witnesses who were acquainted with Alexander said they saw him commit the shooting. And Alexander's story was, in one respect at least, very strange: He said a girlfriend of his had been cheating on him with someone named Raymond, but it was a *different* Raymond from the Raymond whom the shooter accused of the same thing before shooting him – a remarkable coincidence. Nevertheless, we do not think it is beyond reasonable possibility that Alexander would have produced someone willing to testify as an alibi witness had he had the opportunity to try and cannot rule out the possibility that such a witness would have been credible.

The People argue that no prejudice has been shown because the record does not exclude the possibility that personnel at the jail *did* allow Alexander to use the telephone for free after the court noted his request on its minute orders. Alexander's failure to produce any witnesses at trial could mean simply that he found no one willing to give supportive testimony.

We do know the court allocated no money for telephone calls by Alexander. That would have been a proper way to provide the calls. We cannot speculate about whether jail personnel *voluntarily* provided Alexander access to the telephone *without* reimbursement or an expectation of reimbursement through an order of the court.

The People also say the record does not rule out the possibility that Alexander "paid for his calls." But the record shows Alexander was indigent and told the court he had no funds to pay for calls. No more than this is needed.

The People assert that Alexander could have "simply decided that such calls were unnecessary." He surely could have so concluded, yet his defense was an alibi. He could not prepare this defense without access to evidence that he was elsewhere at the time of

the crime, most likely in the form of testimony from an alibi witness. He could not make contact with potential witnesses without making telephone calls. We will not assume he privately chose to abandon his defense.

Next, the People contend that the "record also fails to demonstrate that free telephone calls were reasonably necessary for [Alexander's] defense." One way the record assertedly fails to do this is by lacking proof of Alexander's "financial situation." But as we have said, the court had found him indigent.

The People also rely on the fact that in proceedings after the court denied Alexander's request, he was asked more than once whether he had witnesses or other evidence to present and said he did not. The People maintain: "If [Alexander's] issue with the telephone had been unresolved, it was his burden to alert the court during one of the many times the court inquired." They argue the fact that he did not raise the issue again and had no evidence, but his own testimony at trial "support[s] a conclusion that appellant never had any witnesses he intended to call and had no additional evidence that he wished to present," and therefore there is no showing that free phone calls were reasonably necessary and no showing of prejudice.

The People's contentions are not persuasive. The court's ruling—that it could do nothing to provide telephone access, that only the sheriff's department could do this, and it was up to Alexander to plead with the jail staff—was perfectly clear. The court reiterated these points until Alexander affirmed that he understood. He was not required to make his request again in the hope that the court would change its mind. And the fact that he had no witnesses to call when the time for trial arrived hardly supports the People's conclusions about Alexander's intent.

It is true that after the first time the court expressed its belief that it could order no relief, it asked Alexander if he would be ready for trial and he said yes. This could be taken to suggest that Alexander himself did not consider telephone access to be a reasonably necessary service. In context, though, it is more reasonably interpreted to

mean that even if Alexander were denied what he considered was needed, he still wished to proceed to trial under the conditions the court imposed.

Finally, the People state: "There appears to be no authority supporting any claim that a trial court must personally and proactively monitor whether all resources theoretically available to a pro per defendant are actually being provided." Alexander has not made any such claim. His argument is that the court erroneously failed to order a single specific resource that he requested.

For all the above reasons, we conclude the trial court prejudicially erred when it denied Alexander's request for a reasonably necessary defense service.

In supplemental briefing, the parties agree that if the conviction were affirmed, a remand for resentencing would be appropriate under the legislation known as Senate Bill 620 (Stats. 2017, ch. 682, § 1), amending Penal Code sections 12022.5 and 12022.53. Our holding renders this issue moot.

DISPOSITION

The judgment is reversed.